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IN RE: FACEBOOK PRIVACY  
LITIGATION

Case No. C-10-02389-RMW

**ORDER GRANTING LEAVE TO FILE  
SECOND AMENDED COMPLAINT**10  
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12 [Re Docket No. 138]13  
14 Plaintiff seeks leave to amend his complaint to add an additional named plaintiff and to  
15 “clarify” damages sought in this case. Dkt. No. 138. For the reasons explained below, the court  
16 grants the motion for leave to amend.**I. Background**17  
18 Plaintiff Mike Robertson brings this suit on behalf of himself and all others whose  
19 confidential user information was allegedly disclosed by defendant Facebook to its advertising  
20 partners in violation of Facebook’s own privacy policy, Facebook’s promises to users, accepted  
21 industry standards, and federal law. Dkt. No. 92, at ¶ 1. Plaintiff’s first amended complaint (“FAC”)  
22 alleges that Facebook’s policies state that Facebook “never share[s] [users’] personal information  
23 with [Facebook’s] advertisers” and does “not give [users’] content of information to advertisers  
24 without [users’] consent.” *Id.* ¶ 2. According to the FAC, Facebook, despite these policies,  
25 intentionally and knowingly transmitted confidential user identifiable information, including users’  
full names, to third party advertisers without user consent. *Id.* ¶ 3.26  
27 Several separate actions were originally filed against Facebook, and the cases were  
28 consolidated on August 10, 2010 under the caption *In re Facebook Privacy Litigation*. Following

1 consolidation, plaintiffs' counsel elected to name only Mike Robertson and David Gould as  
2 plaintiffs and putative class representatives. *See* Dkt. No. 36. The court thereafter granted  
3 Facebook's motion to dismiss, Dkt. No. 91, and plaintiffs filed the FAC, Dkt. No. 92. Facebook  
4 again moved to dismiss and the court granted Facebook's motion and dismissed the FAC with  
5 prejudice. Dkt. No. 106. After the dismissal, plaintiff Mike Robertson appealed to the Ninth Circuit.  
6 Dkt. No. 116. As plaintiff Gould did not file a notice of appeal, the judgment against Gould became  
7 final on November 22, 2011. Dkt. No. 107. Accordingly, when the Ninth Circuit reversed the  
8 court's dismissal order on two of the eight dismissed claims, the case was remanded to this court  
9 with Robertson as the sole named plaintiff.

10 Plaintiff now moves for leave to amend the FAC to add Katherine Pohl as an additional  
11 named plaintiff, and to "clarify" the damages it seeks, including adding a request for nominal  
12 damages and disgorgement in his breach of contract claim. Dkt. No. 138.

## 13 **II. Analysis**

### 14 **A. Legal Standard**

15 Under Federal Rule of Civil Procedure 15(a), a party may amend its pleading once as a  
16 matter of course within 21 days of serving it. Fed. R. Civ. Pro. 15(a)(1). After that initial period has  
17 passed, amendment is permitted only with the opposing party's written consent or leave of the court.  
18 Fed. R. Civ. Pro. 15(a)(2). Rule 15 instructs that "[t]he court should freely give leave when justice  
19 so requires." *Id.* Although this rule "should be interpreted with extreme liberality, leave to amend is  
20 not to be granted automatically." *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990)  
21 (internal citation and quotation marks omitted). Courts commonly consider four factors when  
22 determining whether to grant leave to amend: (1) bad faith on the part of the movant; (2) undue  
23 delay; (3) prejudice to the opposing party; and (4) futility of the proposed amendment. *Lockheed*  
24 *Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999); *see also Foman v.*  
25 *Davis*, 371 U.S. 178, 182 (1962). "[I]t is the consideration of prejudice to the opposing party that  
26 carries the greatest weight." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir.  
27 2003) (citing *DCD Programs, Ltd v. Leighton*, 833 F.2d 183, 185 (9th Cir. 1987)). "Absent  
28 prejudice, or a strong showing of any of the remaining *Foman* factors, there exists a presumption

1 under Rule 15(a) in favor of granting leave to amend.” *Id.* (citation omitted). “The party opposing  
2 leave to amend bears the burden of showing prejudice.” *Serpa v. SBC Telecomms., Inc.*, 318 F.  
3 Supp. 2d 865, 870 (N.D. Cal. 2004) (citing *DCD Programs*, 833 F.2d at 187).

4 **B. Plaintiff May File an Amended Complaint**

5 Plaintiff seeks leave to amend to add Pohl and “clarify” the damages he seeks on his breach  
6 of contract theory. Dkt. No. 138. Defendant Facebook opposes the motion, arguing that it would be  
7 unfairly prejudiced, and that plaintiff has unduly delayed in bringing this motion. Dkt. No. 139.  
8 Although defendant is correct that this case has been pending for several years, the case remains in a  
9 relatively early procedural stage, and plaintiff’s proposed amendments will not subject Facebook to  
10 unfair prejudice.

11 Facebook argues that “[p]laintiff sat on his hands for nearly three and a half years at his own  
12 peril.” *Id.* at 5. According to Facebook, plaintiff offers no explanation for why he could not have  
13 added Pohl earlier in the litigation or why he could not have changed his damages theory in prior  
14 amendments of his complaint. *Id.* at 6. Facebook contends that this is not a case of newly-  
15 discovered evidence which would necessitate amendment. *Id.* However, unlike in the cases cited by  
16 Facebook, plaintiff does not seek to plead new facts or change his legal theories. *See, e.g.*,  
17 *AmerisourceBergen Corp. v. Dialysisist W., Inc.*, 465 F.3d 946 (9th Cir. 2006) (finding untimely and  
18 prejudicial a motion to amend filed fifteen months after discovery of new facts). Here, plaintiff  
19 merely seeks leave to amend to add an additional named plaintiff and to seek nominal damages and  
20 disgorgement on his breach of contract claim.<sup>1</sup> Although the delay in plaintiff’s amendment is  
21 significant, there is no evidence of a dilatory motive. *See id.* at 953.

22 Second, the limited nature of plaintiff’s proposed amendments is not likely to prejudice  
23 Facebook. Adding Pohl as a named plaintiff does not change the nature of the case, and the court  
24 finds it unlikely that Facebook will need to conduct extensive further discovery. Additionally,  
25 plaintiff has agreed to limit his discovery requests relating to Pohl. Dkt. No. 140, at 4.

26  
27 <sup>1</sup> Facebook asserts that plaintiff, having never sought disgorgement for his breach-of-contract claim  
28 in prior complaints, is now attempting to add an entirely new damages theory. Dkt No. 139, at 3.  
But the FAC clearly lists disgorgement in the prayer for relief, and while it may not specifically be  
linked to plaintiff’s breach-of-contract claim, the court cannot agree that disgorgement should now  
be considered an “entirely new” theory.

1           Nor are plaintiff's "clarified" damages amendments likely to prejudice Facebook. As  
 2 plaintiff notes, Facebook itself will have the relevant information regarding disgorgement (its  
 3 profits), which plaintiff has already sought in discovery. Additionally, plaintiff's claim for nominal  
 4 damages, if recoverable,<sup>2</sup> will not require any additional discovery because nominal damages  
 5 require no proof of actual damages. *See ProMex, 6 LLC v. Hernandez*, 781 F. Supp. 2d 1013, 1019  
 6 (C.D. Cal. 2011); *see also* Cal. Civ. Code § 3360 ("When a breach of duty has caused no  
 7 appreciable detriment to the party affected, he may yet recover nominal damages").

8           Finally, bringing Pohl into this case as an additional named plaintiff makes it more likely  
 9 that the class members' interests will be served. If for any reason Robertson has to withdraw from  
 10 the case as a named plaintiff, the case may be able to continue with Pohl as a remaining named  
 11 plaintiff.

12           Ultimately, plaintiff does not seek any major changes in the case: he pleads no new facts and  
 13 no new causes of action. Disgorgement is already pleaded as a remedy for Facebook's alleged fraud.  
 14 Because the proposed amendment is unlikely to result in any prejudice to Facebook, the court in its  
 15 discretion grants leave to amend.

### 16           **III. Order**

17           For the reasons explained above, the court grants plaintiff's motion for leave to file a Second  
 18 Amended Complaint ("SAC") as attached as an exhibit to the motion, Dkt. No. 138-1, and on the  
 19 following conditions: (1) any additional class certification fact discovery by plaintiffs will be  
 20 narrowly tailored to Pohl's standing as a class representative, and limited to five interrogatories and  
 21 five production requests with each having no subparts; and (2) Facebook's class certification fact  
 22 discovery deadline is extended to April 1, 2015. The SAC will be deemed filed and served as of the  
 23 date of this order.

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 25           Dated: February 13, 2015

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 Ronald M. Whyte  
 United States District Judge

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<sup>2</sup> The court expresses no opinion at this time as to whether nominal damages are sufficient to fulfill the damages element of a California state breach of contract claim.